Case No. S270798

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LAW FINANCE GROUP, LLC,

Plaintiff and Appellant,

vs.

SARAH PLOTT KEY,

Defendant and Respondent.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Two, Case No. B305790

From an Order Vacating an Arbitration Award
Los Angeles County Superior Court, Case No. 19STCP04251
Honorable Rafael A. Ongkeko

REPLY BRIEF ON THE MERITS

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I.
INTRODUCTION

This case involves a Lender who entered into a consumer loan agreement with consumer Key, charging illegal compound interest (Financial Code section 22309) and illegal loan servicing fees (Financial Code section 22306), in violation of the Financing Law. The Loan Agreement was entirely illegal, void and unenforceable under Financial Code section 22750, subdivision (a): "If any amount other than, or in excess of, the charges permitted by this division is willfully charged, contracted for, or received, the contract of loan is void, and no person has any right to collect or receive any principal, charges, or recompense in connection with the transaction." Despite the patent illegality of the loan, Key repaid the principal. Nevertheless, Lender persisted in attempting to recover the illegal loan servicing fees and illegal interest.

The Loan Agreement contained an arbitration provision, and Lender submitted a claim in arbitration to recover the illegal compound interest, loan servicing fees, and attorneys' fees. The arbitrators agreed with Key that her loan was a consumer loan, making compound interest and servicing fees illegal under the Financing Law, but enforced this illegal contract by failing to declare the Loan Agreement void and unenforceable. The arbitrators then awarded Lender illegal simple interest and attorneys' fees.

In the trial court, the parties submitted competing petitions to confirm and vacate the arbitration award. The trial court found that the parties had agreed to extend the time for Key's response to

Lender's petition to confirm the award, or alternatively that there was good cause for the trial court to extend the time. The trial court found the response was therefore timely filed, and the arbitrators had exceeded their powers by enforcing the illegal, void and unenforceable Loan Agreement. The trial court thus vacated the arbitration award.

The Court of Appeal reversed and ordered the arbitration award confirmed on the ground Key's response was not filed within 100 days of service of the award (although it was filed within 10 days of filing the petition to confirm, as extended by the parties' agreement and/or court order). The Court of Appeal held that although Key's response complied with Code of Civil Procedure section 1290.6,[1] it did not comply with section 1288.2 and both time limits applied. The Court of Appeal further held that the 100-day limit was jurisdictional, could not be extended by the parties or the trial court, and was not subject to equitable tolling or equitable estoppel. And the Court of Appeal held that though the arbitration award enforced an illegal contract, the award must be confirmed because the response was untimely.

This Court should reverse the Court of Appeal for a number of independent reasons, any one of which requires reversal. First, section 1288.2's 100-day time limit is presumed to be non-jurisdictional in the fundamental sense of depriving the court of power to act, and the Legislature has not clearly indicated any alternative intent.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Second, because the time limit is not jurisdictional, equitable tolling is presumed applicable to ensure fairness and prevent denial of a good faith litigant's day in court. Key's counsel's conduct was objectively reasonable in light of the trial court's order vacating the award, the agreement with Lender's counsel to extend the time for filing her response, the actions of the parties conforming with that agreement, the ambiguous statutory language, and the case law stating section 1290.6 provides an exception to or supersedes section 1288.2 in these circumstances.

Third, because the time limit is not jurisdictional, equitable estoppel applies to prevent Lender from asserting the 100-day time limit, and taking advantage of its agreement to a briefing schedule and various other concessions Lender extracted from Key. Key's reliance on Lender's agreement was reasonable under all the circumstances. Fourth, the arbitration award enforced an entirely illegal Loan Agreement, and the Court of Appeal was required to affirm vacatur of the award regardless of whether the response was timely filed. Finally, because Lender's petition to confirm was filed within 100 days of service of the arbitration award, and Key's response complied with section 1290.6, Key's response was timely filed.

Accordingly, this Court should reverse the Court of Appeal, with directions to affirm the trial court and vacate the arbitration award.

II.
LEGAL ARGUMENT

Lender argues that section 1288.2's 100-day time limit to respond seeking vacatur to a petition to confirm is a jurisdictional time limit that can never be subject to equitable relief. Lender also erroneously argues that Key is not entitled to equitable relief on the merits. In addition, citing no authority for such a proposition, Lender argues courts may confirm arbitration awards enforcing contracts that are entirely illegal. Finally, Lender argues section 1290.6 is not an exception to and does not supersede section 1288.2's 100-day time limit where the petition to confirm is filed within 100 days of service of the arbitration award.

The Court should reject each of these arguments. (1) Section 1288.2 is a statutory time limit presumed to be non-jurisdictional. (2) Section 1288.2 is thus presumed to be subject to equitable tolling and equitable estoppel. (3) Key's counsel reasonably agreed with Lender's counsel to extend the time to file a response seeking vacatur, based on the trial court's decision finding the response timely, the parties' express agreement, their compliance with that agreement, the ambiguous statutory language, and the case law stating section 1290.6 provides an exception to section 1288.2 in these circumstances. (4) The Loan Agreement was entirely illegal, void and unenforceable and as this Court has long held, a court may not confirm an arbitration award enforcing such an illegal contract. (5) Section 1290.6 is an exception to section 1288.2's 100-day time limit and Key's response seeking vacatur was timely under section 1290.6.

Therefore, the Court should reverse the Court of Appeal because Key's response was timely filed, section 1288.2's time limit was equitably tolled until the date of its filing, Lender is equitably estopped from asserting section 1288.2's time limit, *and/or* the Court of Appeal erred in confirming the arbitration award enforcing the entirely illegal Loan Agreement.

A. Section 1288.2's 100-Day Time Limit Is Not Jurisdictional In The Fundamental Sense Of Depriving A Court Of Power To Act

Lender's argument that section 1288.2 is a jurisdictional, absolute time limit is not supported by statutory language or case law. (Answer Brief on the Merits ("ABOM") 35-40.) As this Court explained: "A lack of fundamental jurisdiction is an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. Fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's jurisdiction in the fundamental sense is null and void ab initio." (*Kabran v. Sharp Memorial Hosp.* (2017) 2 Cal.5th 330, 339 (*Kabran*), internal quotation marks and citations omitted.)

This Court further explained that a mandatory statutory time limit is not a synonym for fundamental jurisdiction. (*Kabran*, *supra*, 2 Cal.5th at p. 341.) "[A] party's failure to comply with a mandatory requirement does not necessarily mean a court loses fundamental jurisdiction resulting in an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. It is a misuse of the term jurisdictional to treat it as synonymous with mandatory as a general matter." (*Ibid.*) Indeed, this

Court continued, "[t]here are many time provisions, e.g., in procedural rules, that are not directory but mandatory; these are binding, and parties must comply with them to avoid a default or other penalty. But failure to comply does not render the proceeding void in a fundamental sense." (*Ibid*., internal quotation marks and citations omitted.)

In determining whether a statutory time limit is jurisdictional in the fundamental sense, courts "generally presume courts have jurisdiction *unless specifically curtailed by the Legislature*." (*Kabran*, *supra*, 2 Cal.5th at p. 342, emphasis added.) In construing a statute, the courts begin "with the language of the statute, giving the words their usual and ordinary meaning, while construing them in light of the statute as a whole and the statute's purpose." (*Id*. at p. 343.) The use of the word "shall" in a statute does not reveal a clear legislative intent that a time limit be jurisdictional. (*Ibid*.) Rather, the courts look to whether the statute sets forth the time limit in "unusually emphatic form" and whether the statute contains a consequence or penalty for noncompliance with the deadline. (*Ibid*.)

For example, statutory language clearly indicating a legislative intent that a deadline is jurisdictional is found in section 660, subdivision (c): "[T]he power of the court to rule on a motion for new trial shall expire 75 days after the earlier of the filing of a notice of intent or service of notice of entry of judgment. *If the motion is not determined within the 75-day period, ... the effect shall be a denial of the motion without further order of the court*." (Emphasis added; see also *Kabran*, *supra*, 2 Cal.5th at p. 344.) Thus, after 75 days the court loses jurisdiction, and a new trial motion is denied by operation of law.

(*Ibid.)* Such an intent also is found in section 659, subdivision (b), concerning a notice of intent to move for new trial: "The times specified ... *shall not be extended by order or stipulation or by those provisions of Section 1013* that extend the time for exercising a right or doing an act where service is by mail." (Emphasis added; see also *ibid*.)

This Court has determined a statutory time limit to be jurisdictional in the fundamental sense in very rare situations where the statutory language so requires. (E.g., *Kabran*, *supra*, 2 Cal.5th at pp. 344, 347 [time for filing notice of intent to move for new trial, time for court to rule on motion for new trial, and time for court to file statement of reasons for granting new trial jurisdictional]; *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667 [time for filing notice of appeal jurisdictional].)

In contrast, the Court has found a number of statutory time limits to be non-jurisdictional in the fundamental sense. (E.g., *Kabran*, *supra*, 2 Cal.5th at p. 344 [section 659a's aggregate time of 30 days for filing affidavits in support of a new trial motion not jurisdictional]; *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 274-275 [section 998's 30-day time limit for acceptance of settlement offer not jurisdictional]; *County of Santa Clara v. Superior Court* (1971) 4 Cal.3d 545, 550-551, fn. 2 [government claims-filing statutes not jurisdictional]; *Samuels v. Mix* (1999) 22 Cal.4th 1, 8 [statute of limitations not jurisdictional]; *Cal. Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1146-1147 [Government Code section 18671.1's time limit for State Personnel

Board to render decision not jurisdictional].)

Section 1288.2, found in an article of the California Arbitration Act entitled "Limitations of Time," contains no clear jurisdictional language. The statute provides: "A response requesting that an award be vacated or that an award be corrected shall be served and filed not later than 100 days after the date of service of a signed copy of the award…." (§ 1288.2.) This statute of limitations language contains only the word "shall," just like any ordinary statute of limitations. (*Ibid.*) It is not unusually emphatic and does not contain any consequence or penalty. (*Ibid.*) It does not prohibit extension, tolling, estoppel or waiver. (*Ibid.*) And, unlike sections 659 and 660, it includes no clear markers of legislative intent that the deadline is intended to be jurisdictional.

Acknowledging that section 1288.2 standing alone contains no clear markers of legislative intent that the deadline is jurisdictional, Lender instead points to language in sections 1286 and 1286.4, subdivision (a). (ABOM 37-40.) Section 1286.4, subdivision (a) provides that "the court may not vacate an award unless … a petition or response requesting that the award be vacated has been duly served and filed." This statutory language does not use the term "shall," or purport to divest the court of the power or authority to act. (§ 1286.4, subd. (a).) It does not preclude a response from being deemed "duly" filed pursuant to the doctrines of equitable tolling or estoppel.[2] (*Ibid.*)

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[2] In addition, subdivision (b) of section 1286.4 provides that the trial court may *vacate* an arbitration award "*on its own motion*" if a petition or response seeking *correction* has been filed and all parties

Similarly, section 1286 provides that "[i]f a petition or response under this chapter is duly served and filed, the court shall confirm the award as made … unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceedings." *Unlike section 660, subdivision (c), section 1286 does not provide that the arbitration award is deemed confirmed without further order of the court.* And it does not exclude the doctrines of equitable tolling or estoppel from the purview of chapter 4. (§ 1286.)

Lender's reliance on the "duly served and filed" language of section 1286.4 and the "in accordance with [chapter 4]" language of section 1286 is misplaced for another reason as well. In addition to the time limit provided in section 1288.2, chapter 4 contains a number of other statutory requirements for a response requesting vacatur. "Unless a copy thereof is set forth in or attached to the petition, a response to a petition under this chapter shall: (a) Set forth the substance of or have attached a copy of the agreement to arbitrate unless the respondent denies the existence of such an agreement. (b) Set forth the names of the arbitrators. (c) Set forth or have attached a copy of the award and the written opinion of the arbitrators, if any." (§ 1285.6.) Further requirements include that "[a] petition to correct or vacate an award, or a response requesting such relief, shall set forth the grounds on which the request for such relief is based." (§ 1285.8.) Lender does not suggest that these other statutory requirements for a

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are given notice and an opportunity to be heard. (§ 1286.4, subd. (b), emphasis added.) That a court can vacate an award on its own motion indicates the Legislature did not intend section 1288.2's time limit to be jurisdictional.

"duly served and filed" response are also jurisdictional, and yet they are clearly encompassed within the terms "duly served and filed" and "in accordance with [chapter 4]."

Lender has cited no case holding that statutory language stating a petition or complaint be "duly" served and filed constitutes clear evidence of legislative intent that a time limit be treated as jurisdictional. Furthermore, in light of the 1960s-vintage language, likely the use of the word "duly" is simply redundant of the terms served and filed.[3]

In sum, section 1288.2's time limit is presumed to be non-jurisdictional because the Legislature did not specifically curtail the courts' jurisdiction. (See *Kabran*, *supra*, 2 Cal.5th at p. 342.) For that reason, the doctrines of equitable tolling and equitable estoppel are applicable to section 1288.2's time limit.

B. The Time To File Key's Response Seeking Vacatur Was Equitably Tolled To The Date Of Its Filing

As this Court held in *Saint Francis Memorial Hosp. v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 719 (*Saint Francis*), the

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[3] Although the Court of Appeal Opinion stated "numerous" cases have treated the 100-day deadline as jurisdictional, it cites only two—its own decision in *Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538, 545 (*Santa Monica College*) and *Abers v. Rohr* (2013) 217 Cal.App.4th 1199, 1203 (*Abers*). (Opn. 17.) Lender relies on only the same two decisions for this point. (ABOM 37.) But neither of those cases rejected the availability of equitable relief on "jurisdictional" grounds. (*Santa Monica College*, *supra*, 243 Cal.App.4th at pp. 544-545; *Abers*, *supra*, 217 Cal.App.4th at pp. 1208-1210.)

purpose of equitable tolling is to extend a statute of limitations "as necessary to ensure fundamental practicality and fairness." The doctrine applies to "'soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court.'" (*Ibid.*) Equitable tolling is particularly applicable to section 1288.2 in these circumstances where the statutory language is ambiguous, case law indicates section 1288.2's time limit is superseded by section 1290.6, the trial court found the response to be timely, counsel expressly agreed to the briefing schedule, and the arbitration award enforces an illegal contract.

Lender does not dispute that the doctrine of equitable tolling is presumed to apply to all non-jurisdictional time limits. (ABOM 40-41.) Instead, it reiterates its jurisdiction argument, this time in the guise of a legislative intent to foreclose equitable tolling. (ABOM 41-43.) The Court should reject Lender's legislative intent arguments for the same reasons Key sets forth above. (Reply, Section II.A.)

1. Equitable Tolling Applies To Section 1288.2

Lender raises no meaningful arguments concerning the Legislature's intent to foreclose equitable tolling. Instead, it argues express statutory prohibitions are not required to foreclose equitable tolling, 100 days is not a particularly short deadline, the good cause extension in section 1290.6 somehow forecloses equitable tolling for section 1288.2, and the legislative history is vague. (ABOM 43-48.) The Court should reject each of these contentions.

Lender's scattershot arguments miss the point. Statutory time

limits like section 1288.2 are presumed subject to equitable tolling in the absence of clear legislative intent to foreclose equitable tolling. (*Saint Francis*, *supra*, 9 Cal.5th at pp. 719-721.) In determining whether the Legislature has foreclosed equitable tolling, the courts look to any statutory prohibitions, the deadline's length, the statutory context, and any legislative intent to bar equitable tolling. (*Id.* at pp. 719-724.) Here, none of these factors establish any clear legislative intent to bar tolling.

As demonstrated above and in Key's Opening Brief on the Merits, section 1288.2 is an ordinary statute of limitations presumed subject to equitable tolling. (Opening Brief on the Merits ("OBOM") 35-42; Reply, Section II.A.) No language in the statute establishes a clear legislative intent to foreclose equitable tolling—it does not state "in no event" or "for any reason." (See, e.g., *Saint Francis*, *supra*, 9 Cal.5th at p. 722.) In context, neither the "duly served and filed" language in section 1286.4, nor the "in accordance with [chapter 4]" language in section 1286 evidences a clear legislative intent to foreclose equitable tolling of section 1288.2. (*Ibid.*)

Additionally, section 1288.2's 100-day time limit is also relatively brief. (*Saint Francis*, *supra*, 9 Cal.5th at p. 720.) The inclusion of an extension provision in a different statute (i.e., section 1290.6), does not establish a clear legislative intent to foreclose equitable tolling of section 1288.2's 100-day time limit. (*Id.* at pp. 721-722.) And the legislative history does not indicate clear legislative intent to foreclose equitable tolling. (*Id.* at pp. 722-723, 730.)

As established in Key's Opening Brief on the Merits, section

1288.2's text, context, and legislative history support the conclusion the Legislature did not intend to foreclose equitable tolling of section 1288.2. (OBOM, Section IV.A.) Nothing in Lender's Answer Brief on the Merits alters that conclusion.

2. Key Raised Her Entitlement To Equitable Relief As An Issue In The Trial Court And The Court Of Appeal

Lender erroneously asserts in its Answer Brief on the Merits that Key did not raise equitable tolling in the trial court. (ABOM 48-49.) But Key asserted in the trial court that: (1) the court had authority to exercise its equitable powers, (2) she was entitled to equitable relief for fraud, mistake and excusable neglect, (3) Lender was estopped to raise the 100-day time limit because it negotiated for the brief extension, and (4) Lender had waived any right to enforce the 100-day time limit under section 1288.2. (9 Appellant's Appendix ("AA") 4234-4273.) As such, Key raised her right to equitable relief from the statutory time limit, including equitable tolling, in the trial court.

Key also raised her right to equitable relief in the Court of Appeal. Key argued repeatedly in her Respondent's Brief that she was entitled to equitable relief. (Respondent's Brief ("RB") 57-64.) She argued that: (1) section 1288.2 was not jurisdictional (RB 61-64), (2) she was entitled to relief under the doctrine of equitable estoppel (RB 57-60), (3) Lender had waived the right to assert section 1288.2's time limit (RB 60-61), and (4) section 1288.2 was subject to equitable tolling (RB 62-63). Key again raised equitable tolling in her petition for rehearing ("PRH"). (PRH 10-15.) Importantly, the Court of Appeal

did not decide the equitable tolling issue based on any claimed forfeiture of the argument. It simply stated that Key had not raised *Saint Francis* until her petition for rehearing, but decided the equitable tolling issue on the merits, stating that section 1288.2 was jurisdictional. (Modified Opinion 2-3.) This Court also granted review of the equitable tolling issue on the merits.

3. The Reliance Of Key's Counsel On Lender's Agreement Was Objectively Reasonable

Lender does not argue that it did not receive timely notice of Key's intent to seek vacatur, that it was prejudiced in any way by the brief delay, or that Key's counsel acted in bad faith. Its sole argument on the merits is that Key's counsel's belief that the parties could agree to extend the time to file a response requesting vacatur was objectively unreasonable. (ABOM 49.) But that argument is defeated by the trial court's ruling, the conduct of the parties, the ambiguous statutory language, and the case law.

To begin, the trial court made two important factual findings that are dispositive of the equitable tolling reasonableness issue. First, the trial court found, based on the undisputed evidence presented, that the parties had actually agreed to extend the time for filing a response to a petition to confirm requesting vacatur to the date of filing. (9 AA 4281-4282.) Second, the trial court found that there was good cause to extend the time limit to the date of filing to the extent necessary in order to decide Key's request to vacate on the merits—in effect granting Key equitable relief. (9 AA 4282; see, e.g., Cal. Rules of Court, rule 3.1332(d) [factors considered in determining

good cause for a continuance include length of the continuance, prejudice, whether the parties have agreed, interests of justice, and other circumstances relevant to a fair determination].)

The trial court also concluded that section 1290.6 superseded section 1288.2's 100-day rule, where the petition to confirm was filed within 100 days of service of the award. (9 AA 4280-4282.) Although the trial court concluded that Key's petition to vacate was untimely pursuant to section 1288's 100-day rule, it found that Key's response seeking vacatur was timely under section 1290.6 regardless of section 1288.2's 100-day rule. The trial court's ruling, after full briefing and argument by the parties, establishes that Key's attorneys were reasonable in holding the same belief.[4]

Further, the record establishes that from the outset the parties mutually intended that both Lender's petition to confirm and Key's petition to vacate the award be heard together. (9 AA 4249.) When Lender filed its petition to confirm, neither a judicial officer nor a hearing date had been settled. (1 AA 58; 9 AA 4249.) The parties'

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[4] Lender's assertion it had no opportunity to refute Key's counsel's declarations (ABOM 56) is belied by the record. Key filed her petition to vacate and response seeking vacatur reasonably believing Lender's counsel had agreed to the briefing schedule. (1 AA 132-133; 9 AA 4045.) For the first time in response to Key's petition to vacate and in reply to Key's response to its petition to confirm, Lender asserted Key's petition and response were untimely, but failed to file attorney declarations in support of its claim. (8 AA 4021-4042; 9 AA 4227-4233.) Key promptly replied and submitted her attorneys' supporting declarations with her only remaining brief. (9 AA 4234, 4248, 4273.) Lender did not object to Key's attorneys' declarations, request leave to file its own declarations, or attempt to contravene Key's attorneys' declarations at the hearing on the petitions. (9 AA 4277-4287, 4301-4302; RT 1-12.)

counsel acted together to obtain a judicial officer and a joint hearing date. (9 AA 4249-4250.) The parties' counsel agreed the petitions would be heard on the same date and Key did not need to file her petition to vacate until that hearing date had been determined. (9 AA 4249-4250, 4254, 4275.)

The emails between the parties' counsel make clear their agreement applied to both petitions, the oppositions, and the replies. (9 AA 4257 ["[W]e can find out when a hearing can be set pursuant to that judge's calendar, we will work backwards to come up with a briefing schedule for the Petition to Confirm *and the Petition to Vacate that we will be filing*. The briefing schedule will include oppositions and replies." (Emphasis added)]; 9 AA 4259 [discussing two hearings available on February 20 for both petitions]; 9 AA 4265 ["Dueling Petitions"]; 9AA4267 [Key's counsel advising Lender's counsel the last day to file and serve Key's petition to vacate would be January 27]; 9 AA 4272 [Key's counsel advising Lender's counsel he would serve her petition to vacate on January 27].) The parties also agreed that Key's petition to vacate and the parties' oppositions and replies would be governed by section 1005, subdivision (b), and both parties acted in accordance with their negotiated briefing schedule in filing and serving the pleadings. (9 AA 4250, 4257.) The trial court also found as a factual matter that the parties had agreed to this briefing schedule. (9AA4281-4282, 4287.)

Additionally, numerous Court of Appeal decisions led Key's counsel reasonably to believe that section 1290.6 superseded section 1288.2's 100-day time limit when a petition to confirm was filed within

100 days of service of the award. (*Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 66; *Santa Monica College*, *supra*, 243 Cal.App.4th at p. 544; *Coordinated Construction, Inc. v. Canoga Big "A," Inc.* (1965) 238 Cal.App.2d 313, 316-317 (*Coordinated Construction*); *Rivera v. Shivers* (2020) 54 Cal.App.5th 82, 93 (*Rivera*).) And no case had held a response seeking vacatur untimely that complied with the 10-day rule. (*Eternity Investments*, *Inc. v. Brown* (2007) 151 Cal.App.4th 739, 743 (*Eternity Investments*); *Abers*, *supra*, 217 Cal.App.4th at pp. 1204-1205; *Santa Monica College*, *supra*, 243 Cal.App.4th at pp. 544-545; *Coordinated Construction*, *supra*, 238 Cal.App.2d at p. 315; *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1511 (*Elden*); *Douglass v. Serenvision, Inc.* (2018) 20 Cal.App.5th 376, 382-383; *Soni v. SimpleLayers, Inc.* (2019) 42 Cal.App.5th 1071, 1081; *Rivera*, *supra*, 54 Cal.App.5th at p. 94 [denial of petition to confirm reversed only because response seeking vacatur not filed within 10 days].)

As Lender acknowledges (ABOM 50-51), no case has ever held that a response seeking vacatur filed in compliance with section 1290.6 was untimely because it was not filed within 100 days of service of the award, and this Court has never addressed the issue.

Also, case law also indicated to Key's counsel that a party may be entitled to equitable relief from the 100-day deadlines for filing a petition to vacate or response seeking vacatur. (*Abers*, *supra*, 217 Cal.App.4th at pp. 1208-1210; *Coordinated Construction*, *supra*, 238 Cal.App.2d at pp. 318-320; *DeMello v. Souza* (1973) 36 Cal.App.3d 79, 84-85; *So. Cal. Pipe Trades Dist. Council No. 16 v. Merritt* (1981) 126

Cal.App.3d 530, 541 (*So. Cal. Pipe*); *Elden*, *supra*, 53 Cal.App.4th at p. 1512; *Eternity Investments*, *supra*, 151 Cal.App.4th at p. 746; see also *Lovret v. Seyfarth* (1972) 22 Cal.App.3d 841, 855-856; *Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1192, fn. 10; *Shepherd v. Greene* (1986) 185 Cal.App.3d 989, 993.) Again, as Lender tacitly acknowledges (ABOM 53-55), no case has ever held that section 1288.2's 100-day time limit was not subject to equitable relief.

Thus, in light of counsel's express agreement, the parties' conduct in accordance with that agreement, the trial court's ruling, the ambiguous statutory language, and the case law, it was objectively reasonable for Key's counsel to believe that filing Key's response seeking vacatur on February 5, 2020 was timely. Key's counsel's actions "were fair, proper, and sensible in light of the circumstances." (*Saint Francis*, *supra*, 9 Cal.5th at p. 729.)[5] Key contends her response seeking vacatur to Lender's petition to vacate was timely filed pursuant to section 1290.6. But at a minimum, counsel's belief that section 1290.6 superseded section 1288.2 was objectively reasonable.

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[5] On remand from this Court's decision in *Saint Francis*, the Court of Appeal held the hospital's actions were not objectively reasonable because, unlike here, there was no agreement by the parties, the meaning of the statutory language was clear, and that meaning had been confirmed by decisions of the Supreme Court "going back decades." (*Saint Francis Memorial Hosp. v. State Dept. of Public Health* (2021) 59 Cal.App.5th 965, 975.)

C. Lender Is Equitably Estopped To Assert Section 1288.2's 100-Day Time Limit

Lender repeats its argument that section 1288.2 is jurisdictional and therefore the equitable estoppel doctrine is not applicable. And it claims that the doctrine is inapplicable to the facts of this case. For the reasons stated above, Lender's jurisdiction argument is without merit. (Reply, Section II.A.) Furthermore, the undisputed facts establish equitable estoppel.

1. Equitable Tolling And Equitable Estoppel Are Distinct Doctrines—But Equitable Estoppel Also Applies To Section 1288.2

In addition to equitable tolling, Lender is estopped from asserting any failure to comply with section 1288.2's 100-day time limit. Statutes of limitation like section 1288.2 are subject to equitable estoppel. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (*Lantzy*).)[6] Section 1288.2 is not jurisdictional in the fundamental sense. No statutory language evidences a clear legislative intent to

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6 Relief on the grounds of equitable tolling and equitable estoppel are to be distinguished from section 473, subdivision (b)'s mandatory relief on the ground of an attorney's mistake, inadvertence, surprise or excusable neglect, where this Court has held "the statute does not offer relief from mandatory deadlines deemed jurisdictional in nature." (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372.) In stating this rule, the Court apparently was not referring to jurisdiction in the fundamental sense, because it applied its holding to ordinary statutes of limitation. (*Ibid.*; see *Kabran*, *supra*, 2 Cal.5th at pp. 340-341 [conceding that "[t]his court also has suggested on occasion that the 'mandatory' and 'jurisdictional' labels refer to the same concept," but "[i]t is a 'misuse of the term "jurisdictional" ... to treat it as synonymous with "mandatory"' as a general matter."].)

treat the time limit as jurisdictional. And Lender does not even argue that any statutory language forecloses equitable estoppel.

As this Court explained in *Lantzy*: "Equitable tolling and equitable estoppel are distinct doctrines. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended...." (31 Cal.4th at p. 383.) However, equitable estoppel "comes into play only after the limitations period has run and addresses ... the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period." (*Ibid.*) Equitable estoppel "is wholly independent of the limitations period itself and takes its life ... from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." (*Ibid.*)

Equitable estoppel prevents a party from taking a position in court about which the party has deliberately misled the opposing party. "As our Supreme Court has repeatedly emphasized, a finding of estoppel requires some act or representation by the party to be estopped, on which the party seeking estoppel has relied to its detriment: '[t]he doctrine of equitable estoppel is founded on concepts of equity and fair dealing.'" (*Abers*, *supra*, 217 Cal.App.4th at p. 1209.) "'The essence of an estoppel is that the party to be estopped has by false language or conduct "led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury."'" (*Ibid.*; see also *Steinhart v. County of Los*

Angeles (2010) 47 Cal.4th 1298, 1315.) Equitable estoppel relieves a party from the failure to file a response seeking vacatur within 100 days of service of an arbitration award. (*So. Cal. Pipe*, *supra*, 126 Cal.App.3d at p. 541.)

Where the Legislature intends to foreclose equitable estoppel, it may so state. (*Atwater Elementary School Dist. v. Cal. Dept. of General Services* (2007) 41 Cal.4th 227, 234.) But if the Legislature has not abrogated equitable estoppel, a statutory time limit is not absolute. (*Id*. at pp. 234-235.) "[E]quitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy*, *supra*, 31 Cal.4th at pp. 383-384; see also *McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 139-142 [equitable estoppel applicable to statute of limitations stating period "shall not be tolled or extended for any reason"]; *Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 847-848 [same]; *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 405-407 [same where legal malpractice statute of limitations provides "in no event shall the time" exceed four years].)

As this Court's precedent makes clear, section 1288.2 is subject to equitable estoppel. (See *Lantzy*, *supra*, 31 Cal.4th at p. 383.) It is not jurisdictional in the fundamental sense and, as Lender effectively concedes, no statutory language forecloses equitable estoppel.

2. Under The Undisputed Facts, Lender Is Estopped From Asserting Section 1288.2's 100-Day Time Limit

As established above (Reply, Section II.B.3), Key's counsel reasonably relied on the negotiated agreement with Lender's counsel

that (1) both petitions would be heard on the same date, (2) Key's petition to vacate need not be filed until a hearing date for both petitions could be obtained, and (3) Key's petition to vacate, the oppositions and the replies would be filed in accordance with section 1005, subdivision (b) and not the arbitration time limits. Not only did the parties expressly agree to this briefing schedule, both parties actually complied with it and the trial court found that the parties had in fact made this agreement. (9 AA 4281-4282.)

In its Answer Brief on the Merits, Lender argues it was not apprised of the facts regarding Key's filing of the petition, barring equitable relief. (ABOM 57.) But Lender knew when the arbitration award had been served, knew when it filed its petition to confirm, knew of Key's intent to file both a petition to vacate and a response seeking vacatur, knew of the statutory arbitration time limits, knew of the two peremptory challenges to assigned judges, knew of the first availability of two hearing dates before the assigned judge, actively solicited Key's counsel to obtain the same hearing date it had obtained, and knew the exact date when Key intended to file her petition to vacate and her response seeking vacatur. (9 AA 4267, 4272.) It is undisputed that Lender was apprised of the facts.

Lender also argues it did not lead Key's counsel to believe that the parties had agreed to a briefing schedule. (ABOM 57-58.) Again, Lender was actively involved in negotiating the agreed briefing schedule with both petitions to be heard on the same first available hearing date. (9 AA 4257-4267.) In fact, it obtained Key's counsel's agreement to file the first peremptory challenge and forego personal

service of Lender's petition to confirm by expressly agreeing to the briefing schedule. (9 AA 4248-4250, 4257.) Lender located the first available date on the assigned judge's calendar with two open hearings and strenuously urged Key's counsel to obtain the same date for Key's petition to vacate. (9 AA 4251-4252, 4259, 4261.) It is thus undisputed that Lender conducted itself in a way that lulled Key into believing Lender agreed to a briefing schedule that would allow the parties' "dueling petitions" to be heard on the merits.

Further, Lender argues that Key knew the true facts about the negotiated briefing schedule. (ABOM 58.) It is undisputed, however, that Key did not know Lender entered into the briefing schedule agreement with the intent to renege once 100 days had passed. (9 AA 4248-4255, 4273-4276.)

Finally, Lender argues Key's reliance was unreasonable. (ABOM 58-59.) As set forth above (Reply, Section II.B.3), it was reasonable for Key's counsel to believe that filing Key's response seeking vacatur on February 5, 2020 was timely, in light of the trial court's ruling, counsel's express agreement, the parties' conduct in accordance with that agreement, the ambiguous statutory language, and the case law. Lender is equitably estopped from asserting any non-compliance with section 1288.2's 100-day time limit.

D. Because The Loan Agreement Is Entirely Illegal, Void And Unenforceable, The Arbitration Award Enforcing The Illegal Contract Cannot Be Confirmed

1. Arbitration Awards Enforcing Entirely Illegal Contracts Cannot Be Confirmed

Consumer loan agreements willfully violating the Financing Law are completely illegal, void and unenforceable. (Fin. Code, § 22750, subd. (a).) Arbitration awards enforcing an illegal contract must be vacated. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 31-32 (*Moncharsh*) ["the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable *where the issue of illegality of the entire transaction* is raised in a proceeding for the enforcement of the arbitrator's award"]; *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 607, 609, 611-612 (*Loving*) ["'[A] contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract.'"])

More than 70 years ago, this Court unequivocally held that courts could not enforce illegal, void and unenforceable contracts by confirmation of an arbitration award. (*Loving, supra,* 33 Cal.2d at pp. 607, 609, 611-612 [contract with unlicensed contractor illegal and unenforceable; arbitration award vacated].) "A claim that cannot be made the basis of a suit cannot be made the basis of arbitration. The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality.'" (*Id.* at p. 611.) "It seems clear that the power of the arbitrator to determine the rights of the

parties is dependent upon the existence of a valid contract under which rights might arise." (*Id*. at p. 610.) If a party seeks to confirm an illegal contract, the court should deny confirmation and vacate the award. (*Id*. at pp. 610-611.)

The *Loving* Court explained: "'The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, and neither will persons with a claim forbidden by the laws be permitted to enforce it through the transforming process of arbitration.' To hold otherwise would be tantamount to giving judicial approval to acts which are declared unlawful by statute." (33 Cal.2d at pp. 611-612, internal citations omitted.) "If this were not the rule, courts would be compelled to stultify themselves by lending their aid to enforcement of contracts which have been declared by statute to be illegal and void." (*Id*. at p. 614.)

In the many decades following *Loving*, the Court has never diminished the strength of its holding. (*Moncharsh*, *supra*, 3 Cal.4th at pp. 31-32, citing with approval *Loving* and *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723, 738 (*All Points Traders*) [commission agreement with unlicensed broker invalid and unenforceable, requiring arbitration award enforcing the agreement to be vacated]; *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 917, (*Richey*), citing with approval *Loving* and *All Points Traders*.)

To the extent Lender argues that parties can waive judicial review of an arbitration award enforcing an entirely illegal contract, Lender misreads the holdings of the Court's cases. (ABOM 62.) To begin, the loan agreement here is entirely illegal, void and

unenforceable (consumer loan with compound interest and unauthorized loan servicing fees). (Fin. Code, § 22750, subd. (a).) Thus, Lender's arguments concerning partial illegality are irrelevant. (ABOM 62-64.)

Second, contrary to Lender's quotations of snippets, *Moncharsh* says nothing about waiver or forfeiture in the context of an entirely illegal contract. Here is what *Moncharsh* actually says about this issue: "If a contract includes an arbitration agreement, and grounds exist to revoke the entire contract, such grounds would also vitiate the arbitration agreement. Thus, if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether." (*Moncharsh*, *supra*, 3 Cal.4th at p. 29; see also *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 680-681 [no argument the employment agreement was entirely illegal]; *Richey*, *supra*, 60 Cal.4th at p. 920, fn. 3 [no argument the employment agreement was entirely illegal.)

2. The Loan Agreement Is Entirely Illegal, Void And Unenforceable And Its Illegality May Be Raised At Any Time

Here, Lender willfully charged compound interest and unauthorized loan servicing fees. Therefore, pursuant to Financial Code section 22750, subdivision (a), the Loan Agreement was "void." And Lender "has no right to collect or receive any principal, charges, or recompense in connection with the transaction." (Fin. Code, § 22750, subd. (a).) In this regard, Financial Code section 22750, subdivision (a) is almost identical to Business and Professions Code section 7031 (unlicensed contractor may not "bring or maintain any

action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required"). (See *Loving*, *supra*, 33 Cal.2d at p. 607.) And, just as the *Loving* Court held with respect to the contractor's agreement, the Loan Agreement is entirely void, illegal, and unenforceable and an arbitration award enforcing the agreement must be vacated. (*Id*. at pp. 607, 609-610.)

Although *Loving* did not involve a question of the timing of a request to vacate, the language of *Loving* makes clear that "'*whenever* the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.'" (33 Cal.2d at p. 607, emphasis added.) A question of the illegality of the entire contract is a judicial question that may be raised in proceedings to compel arbitration or in proceedings to confirm or vacate an arbitration award. (*Id*. at p. 610.) If uncontradicted evidence that the contract is illegal is presented in proceedings to confirm or vacate the award, "the court should deny confirmation and should vacate any award granting relief under the illegal contract upon the ground that the arbitrator exceeded his powers in making such award." (*Ibid*.) "[A] claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and … an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself." (*Ibid*.) An award based on an illegal contract is void and unenforceable in the courts of this State. (*Id*. at p. 610.) And the "defense of illegality may be raised at any time." (*South Bay Radiology Medical Associates v. W.M. Asher, Inc.* (1990) 220 Cal.App.3d 1074, 1079-1080.)

As this Court stated in another context in *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 147-148: "*Whatever the state of the pleadings*, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, *the court has both the power and duty to ascertain the true facts* in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids." (Emphasis added.) Additionally, "[i]t is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. [Citation.] It is not too late to raise the issue ... even on appeal." (*Ibid.*)

Although Key contends her response seeking vacatur was timely filed, the Court of Appeal also did not have the power or authority to enforce the illegal Loan Agreement. The trial court was correct that the Loan Agreement was entirely illegal, void and unenforceable and the arbitration award enforcing that agreement was required to be vacated regardless of "the state of the pleadings."[7]

E. When A Petition To Confirm Is Filed Within 100 Days Of Service Of The Award, Section 1290.6 Supersedes Section 1288.2's 100-Day Time Limit

As explained in Section IV.D of the Opening Brief on the Merits, two different sections of the California Arbitration Act relate to the

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[7] Key argued the Loan Agreement was entirely illegal and must be vacated in her Respondent's Brief (RB 24, 38) and again in her Petition for Rehearing (PRH 29-34).

timing of a response to a petition to confirm seeking vacatur, creating much ambiguity. Section 1288.2 provides that such a response must be filed within 100 days of service of the award and section 1290.6 provides that the response must be filed within 10 days of filing the petition to confirm as may be extended by agreement of the parties or order of the court. Many courts have pointed out the confusion caused by these two provisions and many more have stated that section 1290.6 is an exception to section 1288.2's 100-day rule if a petition to confirm is filed within 100 days of service of the award. (OBOM 62-64.)

That section 1290.6 is an exception to section 1288.2's 100-day rule under these circumstances, as many courts have said, makes eminent good sense. A party to an arbitration award is entitled to only 100 days to petition to vacate the award, a short time frame in and of itself. But because judicial proceedings regarding arbitration awards are to be decided at the same time (confirmation or vacatur), if a petition to confirm is filed within that 100-day period, the party seeking vacatur is deprived of her 100 days and given only 10 days to respond, allowing the party seeking confirmation to create a trap for the party seeking vacatur. The statutes do not require and it simply makes no sense to apply *both* time limits at the same time, when consumers have so little time to seek review of arbitration awards as it is. And the party seeking confirmation can avoid any confusion and eschew gamesmanship by simply waiting 101 days to file a petition to confirm.

This construction of the interplay between section 1288.2 and

section 1290.6 satisfies all of the purposes of the California Arbitration Act. Where a response to a petition to confirm seeking vacatur is filed, the presentation of all issues relating to the award will be decided at the same time. (Motion for Judicial Notice ("MJN") 9-10.) And where the petition to confirm is filed within 100 days, the arbitration award *proceeding* in which vacatur is sought will have been brought promptly within 100 days. (*Coordinated Construction*, *supra*, 238 Cal.App.2d at p. 317.) Further, the challenge to the award will have been made while the evidence is fresh and the witnesses available. (*Eternity Investments*, *supra,* 151 Cal.App.4th at p. 746.) Also, a petition to confirm will have been filed, so judicial enforcement of the award will have already been requested and judicial resources will not have been wasted. (*Ibid*.) In addition, the party seeking vacatur will not be whipsawed between two competing time limits at the whim of the party seeking confirmation.

Here, the award was served on September 19, 2019, and Lender filed its petition to confirm only 12 days later. (1 AA 58, 61-63, 106-123, 125-126; 9 AA 4249.) Key's counsel promptly informed Lender's counsel that he would be filing Key's petition to vacate and response seeking vacatur. Because the parties intended to challenge the assigned judicial officer (and a second assigned judicial officer), effectuate service, and obtain a joint hearing date for the two petitions from the calendar of the judge ultimately assigned to hear the proceeding, they agreed to extend the time for filing the petition to vacate, the responses and the replies to coordinate with the hearing date. (9 AA 4249-4250, 4257.) Due to the disqualification of two judicial officers and the congested calendar of the third, a joint hearing

date was not obtained until February 20, 2020—meaning Key's response seeking vacatur would necessarily be filed more than 100 days after service of the award as the parties agreed. (1 AA 155-156; 9 AA 4250-4251, 4259.) But it also meant the petitions to confirm or vacate the award would be heard together at the first available time, leading to judicial economy and savings for the parties.

These facts present the quintessential scenario for application of section 1290.6's exception to section 1288.2's 100-day rule. They also demonstrate the mischief that can be caused by application of both time limits under circumstances where a petition to confirm an arbitration award is filed within the first 100 days after service of the award. It is undisputed Key's response seeking vacatur complied with section 1290.6. Therefore, the Court should reverse the Court of Appeal and hold that Key's response seeking vacatur was timely filed in compliance with section 1290.6 regardless of whether it was filed more than 100 days after service of the award.

F. Lender Has Forfeited Any Argument That The Trial Court Was Required To Independently Review The Evidence De Novo

First, Lender did not raise the issue of independent review of the arbitrators' illegality finding in the trial court, and in fact affirmatively argued that the trial court should not review the evidence de novo. (8 AA 4021-4039; RT 11.) Second, the Court of Appeal never addressed any issue of independent review. Third, Lender did not seek review of this issue in this Court. Finally, Lender mentions this issue but makes no reasoned argument in its Answer

Brief on the Merits. (ABOM 71-72.)[8]

III.

CONCLUSION

For each of these reasons, this Court should reverse the judgment of the Court of Appeal and order the trial court judgment affirmed and the arbitration award vacated.

DATED: May 2, 2022 GRIGNON LAW FIRM LLP

By /s/ Margaret M. Grignon
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[8] As Key's briefing in the Court of Appeal established, Lender's independent review argument is completely without merit. (RB 38-42.)

CERTIFICATE OF WORD COUNT
CRC Rule 8.520(c)(1)

On behalf of Sarah Plott Key, I, Margaret M. Grignon, certify that in compliance with California Rules of Court, rule 8.520(c)(1), the above brief is comprised of 8,351 words. To verify this number, I employed the word count feature made part of the Microsoft Word processing program used by my firm's offices.

DATED: May 2, 2022 /s/ Margaret M. Grignon
Margaret M. Grignon

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